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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB,
individually and as Representatives of the Class of Reston,
Virginia Homeowners,

Petitioners,

v.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

On September 18, 1974, the respondent Fairfax County Bar Association ("Fairfax") served and filed its brief in opposition to the granting of the petition herein. Reproduced on page 1 of the Appendix to that brief is a copy of a Resolution adopted two days earlier by Fairfax rescinding its minimum fee schedule, which has been challenged by

petitioners in this action, and stating its intention not to reinstitute any such schedule in the future. Based upon this Resolution, Fairfax claims that petitioners' request for injunctive relief is moot. It also argues that its liability should be prospective only, and thus petitioners' claim for damages should be dismissed and the petition denied.

ARGUMENT

Petitioners do not question the sincerity of Fairfax's assurance that it will not issue any further fee schedules, and therefore agree that there is no need for injunctive relief against Fairfax. However, petitioners' request for injunctive relief against the State Bar is not moot because the State Bar has not made any changes in its two practices challenged in this case. Thus, the State Bar has not withdrawn Opinions 98 and 170 under which the failure of an attorney to abide by minimum fee schedules can result in sanctions being imposed against him. Even more important is that the State Bar issued two fee reports containing suggested local minimum fee schedules which were adopted almost without change by local bar associations throughout Virginia, including Fairfax. If those reports are not withdrawn, attorneys will be free to adhere to the fees set forth in them, rather than those in the virtually identical schedules of their local bar associations. In fact, unless the decision of the Court of Appeals is reversed, the State Bar will be able to issue a new fee report with a schedule of fees for each locale, just as it did in 1969 when, as the report itself acknowledged, the changes from its 1962 report reflected "a general scaling up of fees for legal services." App. 3, Brief of Fairfax. Therefore, it is clear that the need for injunctive relief against the State Bar is not affected by Fairfax's action on September 16th.

Quite apart from the prayer for injunctive relief, petitioners have sought damages on behalf of a certified class of 2400 homeowners, and it is undisputed that the rescission of the fee schedule cannot moot that claim. Fairfax recognizes this fact, but seeks to have the damage claim dismissed on the ground that there should be only prospective relief in this case even if liability is established. In effect, Fairfax seeks an adjudication on the prospectivity issue by this Court before any decision is made either to grant certiorari or on the merits. We submit that Fairfax's reasoning is flawed and should be rejected by this Court.

The first time that Fairfax suggested that relief in this action should be prospective only was after the decision by the District Court holding that Fairfax violated the antitrust laws. After hearing oral argument on Fairfax's motion, the District Court denied the application to limit the effect of its decision to prospective relief only. Fairfax extensively briefed that issue on its appeal to the Fourth Circuit, but the question was never reached, because the Court held that Fairfax had not violated the antitrust laws. Accordingly, we suggest that this Court should not pass on the question of prospectivity until the Court of Appeals has decided that issue, an occurrence which cannot take place until this Court reverses the decision of the Court of Appeals dismissing the complaint.* Thus, unless the petition is granted, petitioners will also be out of court on their damage claims, which are clearly not moot.

Moreover, there is no merit to the contention of Fairfax that liability should be applied only prospectively. This

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* Similarly, the Eleventh Amendment contentions of the State Bar (Motion to Dismiss, pp. 7-8), which apply only to the claim for damages, were not decided in the Court of Appeals or the District Court and should not be decided by this Court in the first instance.

Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), demonstrates the very narrow range of cases where the doctrine of prospectivity will apply in the antitrust area:

> There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. *Id.* at 496.

This Court further declared that the doctrine of prospectivity applied only where a decision adopted "a radically new interpretation of the Sherman Act" *id.* at 497, or where there was "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one." *Id.* at 498. Judged by these standards, it is apparent that there is simply no basis to sustain a plea for prospective application only, with its attendant denial of damages to petitioners who have been victimized by violations of the Sherman Act. See also *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969).

CONCLUSION

The recent decision of the Fairfax County Bar Association to rescind its minimum fee schedule does not render this case moot because of the continuing viability of petitioners' claim for injunctive relief against the Virginia State Bar and the claim for damages against both respondents.

All of the grounds set forth in the petition as a basis for granting the writ still apply, and we accordingly submit that it should be granted.

Respectfully submitted,

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